STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2081

State of Minnesota,
Respondent,

vs.

Nasir Ahmed Mohamed,
Appellant.

Filed February 24, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 06026206

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Jeff DeGree, DeGree Law Office, 545 Colonial Warehouse, 212 Third Avenue North, Minneapolis, MN 55401 (for appellant)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Nasir Ahmed Mohamed challenges his conviction of fifth-degree possession of cathinone. Appellant contends that (1) the controlled substance statute at

issue is void for vagueness and violates his due process rights; (2) the evidence was insufficient to support his conviction; and (3) the district court erroneously shifted the burden of proof to appellant. We affirm.

D E C I S I O N

I.

Appellant was charged with fifth-degree possession of cathinone after being found in possession of khat.[1] Appellant waived his right to a jury trial and agreed to a court trial. The district court convicted him of the charge. Appellant now contends that because Minnesota's controlled substance statutes make no mention of khat and because an ordinary person does not know that khat contains the controlled substance cathinone, the statutes are unconstitutionally vague and fail to provide fair warning that possession of khat is illegal. We disagree.

Constitutional challenges are questions of law, which we review de novo. *State v. Bussman*, 741 N.W.2d 79, 82 (Minn. 2007). In conducting this review, we recognize that "Minnesota statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989).

The constitutions of the United States and Minnesota provide that no person shall be held to answer for a criminal offense without due process of law, "nor be deprived of

[1] Khat is a plant native to East Africa that contains cathine and cathinone, both controlled substances under Minnesota law. *State v. Ali*, 613 N.W.2d 796, 797 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). Cathinone is the stimulant at issue in this case. *Id.* Khat is consumed by chewing and produces a stimulant reaction including hyperalertness, hyperactivity, and elevated respiration and heart rate. *Id.*

life, liberty or property without due process of law." U.S. Const. amend. V, XIV; Minn. Const. art. I, § 7. Appellant argues that Minn. Stat. § 152.025, subd. 2(1) (2006), is unconstitutionally vague under the Due Process Clause of both the state and federal constitutions because the statute fails to give notice that possession of khat may contain an illegal controlled substance. The statute provides that "a person is guilty of controlled substance crime in the fifth degree if the person unlawfully possesses one or more of mixtures containing a controlled substance classified in schedule I, II, III, or IV, except a small amount of marijuana." Minn. Stat. § 152.025, subd. 2(1). Cathinone and methcathinone are classified as schedule I controlled substances. Minn. Stat. § 152.02, subd. 2(6) (2006). Neither statute specifically refers to khat.

"The void-for-vagueness doctrine requires that a legislative enactment define a criminal offense with sufficient definiteness and certainty that 'ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *State v. Reha*, 483 N.W.2d 688, 690-91 (Minn. 1992) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983)). Statutes imposing criminal penalties require a higher standard of certainty. *Id.* at 691. But "the vagueness doctrine is based in fairness and is not designed to 'convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.'" *Id*. (quoting *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957 (1972)). The "touchstone for the fair warning requirement is whether the statute, either standing alone or as construed by prior

judicial decision, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267, 117 S. Ct. 1219, 1225 (1997). "When broad constitutional requirements have been made specific by the text or settled interpretations, willful violators certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment . . . . [T]hey are not punished for violating an unknowable something." *Id.* at 267, 117 S. Ct. 1225-26 (quotation omitted).

Here, a prior decision of this court has addressed the issue of whether the conduct of possessing khat is criminal. In *State v. Ali*, the defendants were each charged with one count of fifth-degree cathinone possession. 613 N.W.2d at 797. The khat seized from the defendants was tested for the presence of cathinone. *Id.* The samples all contained cathinone, but the testing neither quantified the amount of cathinone present nor determined whether the cathinone present was in the form of the negative isomer (the more potent stimulant) or the positive isomer. *Id.* In *Ali*, this court looked to federal and other state court decisions in deciding the issue of whether the state must prove that the amount of cathinone possessed by a defendant is in a quantity having a stimulant effect in order to support a charge for possession of cathinone. *Id.* at 798-99. The *Ali* court held that Minnesota law prohibits the possession of cathinone regardless of whether the amount present is sufficient to produce a stimulant effect. *Id.* at 800. The *Ali* decision states explicitly that khat "contains cathine and cathinone, both controlled substances under Minnesota law," and also acknowledges that "because the cathinone in khat deteriorates rapidly, by the time the khat reaches Minnesota from East Africa its potency

has diminished." *Id.* at 797. Despite the khat's diminished potency, this court concluded that the state need not prove that the quantity of the cathinone present in the khat had a stimulant effect. *Id.* at 800. Thus, we conclude that the *Lanier* fair warning requirement was satisfied here because the *Ali* decision made it reasonably clear that khat contains cathinone, which is illegal to possess.

In addition, federal jurisprudence provides guidance on this issue. Minnesota's statutes are comparable to federal controlled substance laws because Minnesota has adopted a version of the Uniform Controlled Substances Act. *Ali*, 613 N.W.2d at 798. And like Minnesota law, federal regulations classify cathinone as a schedule I controlled substance. 21 C.F.R. § 1308.11(f)(3) (2008). Several federal circuits have rejected similar fair warning challenges to khat possession prosecutions where the federal controlled substance statute, like the Minnesota statute, does not specifically list khat. In *United States v. Sheikh*, the defendant was charged with possession of cathinone and cathine with intent to distribute. 367 F.3d 756, 758 (8th Cir. 2004). The Eighth Circuit determined that the Controlled Substance Act is not unconstitutionally vague for failing to specifically list khat. *Sheikh*, 367 F.3d at 764. The Eighth Circuit explained:

> Due process does not require the statute specifically to prohibit either 'khat' or 'khat containing cathinone' as a precondition to conviction. And the fact that the architects of the law 'might, without difficulty, have chosen 'clearer and more precise language' equally capable of achieving the end which [they] sought does not mean that the statute which [they] in fact drafted is unconstitutionally vague.

Id. at 764 (quoting *United States v. Hussein*, 351 F.3d 9, 15 (1st Cir. 2003)); s*ee also United States v. Caseer*, 399 F.3d 828, 839 (6th Cir. 2005) (rejecting appellant's claim

that the federal statute prohibiting materials containing cathinone are void for vagueness as applied in prosecution for khat possession because of the scienter requirement for controlled substance prosecutions). We agree with these federal courts that the omission of "khat" from the controlled substance laws and regulations does not preclude a conviction under a statute prohibiting possession of cathinone.

Further, Minnesota law, like the federal controlled substance statute, requires that the state prove, through either direct or circumstantial evidence, that appellant had the requisite scienter of knowing possession. "[I]n order to convict a defendant of unlawful possession of a controlled substance, the state must prove that defendant consciously possessed . . . the substance and that defendant had actual knowledge of the nature of the substance." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975); s*ee Hussein*, 351 F.3d at 18 ("[T]he cases are legion that a defendant can lawfully be found guilty of having violated [the federal controlled substance act] even if he did not know the exact nature of the drug he possessed as long as he knew that he possessed an illegal drug. . . . Consequently, it was enough for the government to show that the appellant knew he had a controlled substance in his possession.").

Here the district court found that appellant (1) lied about the contents of the packages in his possession; (2) aided in a complex shipment scheme that utilized multiple shipping companies in order to get the khat into Canada; (3) used a false name to receive many of the shipments from Kenya; (4) rented two storage lockers, for the apparent purpose of maintaining secrecy, to store, weigh, and repackage the khat; and (5) was paid a considerable amount of money for the relatively simple task of receiving the packages

and shipping them to Canada. Based on these facts, we conclude that the district court did not err in determining that the state satisfied the requirement that appellant knowingly possessed a controlled substance.

We conclude that the *Ali* decision of this court and related federal caselaw made it reasonably clear that Minnesota law prohibits the possession of khat because it contains cathinone. Therefore, the fair warning requirement is satisfied. And we further conclude that Minnesota's scienter requirement overcomes any vagueness concern that a person of ordinary intelligence would expose himself to criminal penalties due to the vagueness of the controlled substances schedules with respect to khat.

II.

Appellant argues that the evidence is insufficient to support his conviction. Specifically, appellant contends that the testimony of the state's chemist that she relies on Drug Enforcement Agency (DEA) reports constitutes "substantive evidence" that casts significant doubt on the chemist's conclusion that the khat possessed by appellant contained cathinone. Appellant also contends that the evidence was insufficient to support appellant's conviction because the district court failed to consider as "substantive evidence" the content of the DEA reports that he read into the record during his cross-examination of the chemist. We disagree.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby

prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). When considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

In order for the district court to find appellant guilty of the crime of possession of a controlled substance in the fifth degree, the state was required to prove each of the following three elements beyond a reasonable doubt: (1) appellant unlawfully possessed one or more mixtures containing cathinone; (2) appellant knew or believed that the substance appellant possessed was a controlled substance; and (3) appellant's act took place on or about April 18-19, 2006, in Hennepin County, Minnesota. Minn. Stat. § 152.025, subd. 2(1); 10A *Minnesota Practice*, CRIMJIG 20.36 (2006).

At the court trial, the chemist testified on direct examination that she used the normal field-standard procedures to test the khat seized from appellant, and that the test results showed that cathinone was present in the khat. Appellant then cross-examined the chemist about what materials she had used to study cathinone. The chemist responded

that in briefly studying cathinone, she used a DEA publication called "Micrograms," and that she considers the DEA to be a reliable source of information regarding controlled substances. Appellant's counsel then asked the chemist to read for the record a section from a DEA fact sheet that he provided. The excerpt indicated that "[c]athinone converts to the considerably less potent cathine in about 48 hours." When asked whether the DEA material was inconsistent with her opinion regarding khat, the chemist testified that the DEA fact sheet did not comment as to whether a sample can be preserved by freezing and that she did not know how the khat seized from appellant was handled or whether it was frozen or preserved in another way prior to receiving it in her lab. On redirect, the chemist testified that it was her opinion, based on her test results, that the khat brought to her by the police contained the controlled substance cathinone. The chemist's lab reports, which showed that the substance seized from appellant tested positive for cathinone, were admitted into evidence for the district court's examination.

Appellant does not argue that he successfully cast doubt on the reliability of the chemist's testing methods or the chain of custody of the evidence seized. And appellant does not claim that the state failed to provide sufficient evidence to satisfy any particular element of the crime. Rather, appellant takes issue with the district court's refusal to consider the DEA reports as "substantive evidence" and complains that the court was not persuaded by his attempted impeachment of the chemist's conclusion that the khat possessed by appellant contained cathinone.

We conclude that it is inconsequential whether appellant's use of the DEA reports is "impeachment evidence" or "substantive evidence." The district court heard the

substance and content of the DEA reports relied on by appellant in cross-examining the chemist. And the district court, as the fact-finder, acted within its purview in determining the witnesses' credibility and the weight to give to the evidence presented by the parties. Assuming that the district court believed the state's witnesses and disbelieved any evidence to the contrary, we conclude that the district court did not abuse its discretion in crediting the chemist's testimony that the khat seized from appellant tested positive for cathinone. *See Moore*, 438 N.W.2d at 108 (stating this court must assume that the fact-finder believed the state's witnesses and disbelieved any contrary evidence).

Viewing the evidence in the light most favorable to the conviction, we conclude that the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the state presented sufficient evidence to satisfy all three of the elements of the crime beyond a reasonable doubt.

III.

Appellant argues that the district court improperly shifted the burden of proof to appellant. We disagree.

The state bears the burden of proving all of the elements of an offense beyond a reasonable doubt, and the burden of proof may not be shifted to the defendant to prove his innocence. *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984). Appellant takes issue with the following statement in the district court's memorandum: "Defendant had the opportunity to present his own expert witness or offer his scientific studies as substantive evidence, but he chose not to do so." Appellant contends that this statement

diluted the state's burden of proof and had the effect of placing the burden on appellant. But appellant fails to acknowledge that the quoted sentence relates to (1) the district court's response to appellant's argument that the chemist's conclusion could not possibly be correct in light of the portions of the DEA reports that were read into the record; and (2) the district court's explanation as to why it found the chemist credible despite the DEA reports that appellant used in his attempt to impeach the chemist.

Moreover, the district court stated several times in its findings of fact, conclusions of law, order and memorandum that it was the state's burden to prove all elements of the charged crime beyond a reasonable doubt. The court explicitly stated that "If the State does not prove any of the . . . elements beyond a reasonable doubt, Defendant is not guilty of the crime of possession of a controlled substance in the fifth degree." We conclude that the district court neither applied the wrong burden nor shifted the burden of proof to appellant.

Affirmed.